IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 6[redacted]202

ROBERT L. MESSEL,
Petitioner, Plaintiff and Appellant,

versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

Motion to Dismiss or Affirm Appeal, and Brief in Support of Said Motion.

PURNELL M. MILNER,
Attorney for Respondent, Defendant and Appellee.

MONTGOMERY-ANDREE PRINTING CO. INC., 307 CHARTRES, N. O.

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NO. 694.

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versus

FOUNDATION COMPANY,
Respondent, Defendant and Appellee.

COMES NOW the Appellee herein, the FOUNDATION COMPANY, by PURNELL M. MILNER, its Counsel, appearing in that behalf, and moves the Court to dismiss the appeal in the above entilted cause for want of jurisdiction because:

The judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit, the Supreme Court of the State of Louisiana, maintaining the plea of one year's prescription to an action for compensation under the State Employers' Liability Act, Act No. 20 of the Legislature of 1914, being a matter of practice and remedy exclu-

sively and finally within the jurisdiction of said State Court, and the said Appellee by counsel as aforesaid also moves the Court to affirm the said judgment or decree from which the said appeal purports to have been taken because, although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that the said appeal was taken for delay only or is manifestly frivolous, for that the plaintiff and appellant, alleging a maritime tort, sought relief in an action *in personam* in the State Court under Article 2315 of the Revised Civil Code of Louisiana, which the State Supreme Court has held was superceded by the Employers' Liability or Compensation Act passed by the Legislature and known as Act No. 20 of 1914 in all cases of hazardous employment and further later after one year sought relief, in the alternative under said Employers' Liability or Compensation Act; the jurisprudence of this Court in the *Jensen case, 234 U. S., 52*, and in the *Knickerbocker case, 253 U. S., 149*, having settled the jurisprudence that the remedy under the Workmen's Compensation Law of a State is not the remedy saved to suitors under the Judiciary Act of 1789, and Judicial Code, §§ 24-256.

PURNELL M. MILNER,

Attorney for Defendant and Appellee.

AFFIDAVIT.

STATE OF LOUISIANA,
PARISH OF ORLEANS.

Before me, the undersigned Notary Public, personally came and appeared Purnell M. Milner, attorney for defendant and appellant in the suit of *Robert L. Messel v. Foundation Company*, No. 694 of the docket of the Supreme Court of the United States and on being sworn deposes and says that on Friday, March 4, 1927, he served the foregoing motion to affirm or dismiss together with Brief in support thereof upon Chas. I. Denechaud and Claude L. Johnson, attorneys for Robert L. Messel, plaintiff and appellant.

P. M. Milner.

Sworn to and subscribed
before me the 4th day of
March, 1927.

Wm. A. Porteous, Jr.,
Notary Public.

We acknowledge receipt of copy of the above motion, with brief in support thereof, and hereby waive the requirement of three weeks notice before submitting motion, and agree that the same may be submitted on the day fixed for the hearing of this cause.

New Orleans, La.,
March 4, 1927.

Claude L. Johnson,
Attorney for Plaintiff and Appellant,
Robert L. Messel.

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versus

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ORIGINAL BRIEF ON MOTION TO DISMISS OR AFFIRM.

Our motion to dismiss for want of jurisdiction is predicated on the fact that the lower State Court which had jurisdiction of this case, maintained the plea of one year's prescription to plaintiff's suit, which judgment was affirmed by the Circuit Court of Appeals for the State and affirmed by the Supreme Court of Louisiana.

This Court, we believe, is without jurisdiction to review a final judgment of the highest Court of the State, dismissing an action founded upon a State statute, upon a plea of prescription, or brought beyond the time stipulated in the Act within which the case must be brought or be forever barred.

This suit grew out of an alleged maritime tort and was brought *in personam* against the owner of the vessel, Foundation Company, under Article 2315 of the Civil Code of Louisiana. This article of the Civil Code provides that "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc.

The suit was instituted on the 23rd day of December, 1920, under Article 2315 of the Civil Code of Louisiana, for injury and damages alleged to have been received in July, 1920. The Workmen's Compensation Statute, Act 20 of 1914, as amended, was attacked as unconstitutional and no relief was prayed for thereunder.

An exception of no right or cause of action was filed, based on jurisprudence of the State that the Workmen's Compensation Statute, Act 20 of 1914, was exclusive as to the rights and remedies for injuries received by employees engaged in a hazardous occupation. The Act, *Section 1, Paragraph 2 (2)*, makes the operation, construction, repair, removal, maintenance and demolition of vessels, boats and other water crafts as hazardous, as follows:

> *Section 1.* Be it enacted by the general assembly of the State of Louisiana, that this act shall apply only to the following:
>
> *1.* ———————————
>
> *2.* Every person performing services arising out of and incidental to his employment in the course of his employer's trade,

business or occupation in the following hazardous trades businesses and occupations:

(2) The operation, construction, repair, removal, maintenance and demolition of railways and railroads, vessels, boats and other water craft, etc., etc.

Section 34 of the Act provides:

"That the rights and remedies herein granted to an employee on account of a personal injury for which he is entitled to compensation under this Act shall be *exclusive* of all other rights and remedies of such employee, his personal representatives, dependants, relations or otherwise, on account of such injury."

The Supreme Court of Louisiana, in *Colorado v. Johnson Iron Works, 146 La. An., 68 (83 So., 381)*, decided (syllabus):

"Employers' Liability Act provides exclusive remedy of servant killed in the course of his employment, and supercedes Civ. Code Art. 2315 giving widow right of action for wrongful death."

To same effect: *Philips v. Guy Drilling Co., 143 La. An., 951.*

The Supreme Court of Louisana has repeatedly held that this Act was constitutional.

Day v. Louisiana Central Lumber Co. 144 La. An., 820 (81 So., 328).

On *May 22nd, 1922*, a supplemental petition was filed by plaintiff, asking, in the alternative, *for the first time*, if the Workmen's Compensation Statute was constitutional, that the plaintiff be allowed compensation accordingly.

To this supplemental and amended petition, the Foundation Company filed exception:

(1) Change of issue.

(2) Prescription of one year. (Tr., pp. 25-26.)

The Compensation Statute, *Act 20 of 1914*, as amended, provides, *Section 31:*

> "That in case of personal injury (including death resulting therefrom) *all claims for payments shall be forever barred unless within one year after injury or death the party* shall have agreed the payment to be made under this Act, or *unless one year after the injury proceedings have been begun as provided in Section 17 and 18 of this Act.*" (Italics ours.)

The exceptions were argued before Judge Hugh C. Cage, Judge of the Civil District Court for the Parish of Orleans, State of Louisiana. The exceptions were maintained, as shown by the following order (Tr., p. 27):

> "When after hearing pleadings and arguments of counsel, the Court considering all the exceptions filed by the defendant well founded for reasons dictated to the stenog-

rapher to be reduced to writing and filed of record,

"It is ordered that all exceptions filed by the defendant be maintained and the suit of plaintiff, Robert Leon Messel, against the defendant, the Foundation Company, be dismissed."

We respectfully urge that this Court is without jurisdiction to review a final judgment of the highest Court of a State, maintaining a plea of prescription of one year to the action, prescribed by the very statute under the provisions of which the plaintiff seeks to recover, dismissing plaintiff's suit. The entire suit is dismissed.

Our motion to affirm the decree of the State Supreme Court and Court of Appeals is based on the jurisprudence established by this Court in *Peters v. Veasey, 251 U. S., 121.*

The Supreme Court of Louisiana in this case reported in *142 La. An., 1012*, held that the Act of October 6, 1917, amending the Judicial Code, Secs. 24 and 256, saving to claimants the rights and remedies under the Workmen's Compensation Law of any State was retroactive and gave Veasey a right of action in the State Court, although his employment was maritime in its nature and a maritime contract.

This Court reversed the finding, held the act not retroactive, held that the matter was clearly within the admiralty jurisdiction and in such case the Workmen's Compensation Law of the State had no application when the accident occurred.

This was held again in the case of *Southern Pacific Co. v. Jensen, 244 U. S., 219.*

Both of these cases were decided on claims originating prior to the Act of October 6, 1917, amending the Judicial Code, Sections 24 and 256. This amendment was later decided to be unconstitutional in the case of *Knickerbocker Ice Co. v. Stewart, 253 U. S., 149.* This, we take it, left the law as it was prior to the passage of this amendment.

At the date of the accident, July 9, 1920, when petitioner was injured while engaged on a martime contract, he had his remedy in admiralty exclusively, for the reason that in so far as the State of Louisiana is concerned, by the passage of Act 20 of 1914, known as the Workmen's Compensation Act, the plaintiff was precluded from bringing an action under Art. 2315 of the Civil Code reading, "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," etc., and was restricted to the exclusive remedy of compensation, for injuries received by employees engaged in hazardous work, set forth by Act 20 of 1914. In effect, in all cases of injury received in hazardous works, this Art. 2315 of the Civil Code is repealed.

Williams v. Blodgett Construction Co., 146 La. An., 842-843.

Colorado v. Johnson Iron Works, 146 La. An., 68.

Philips v. Guy Drilling Co., 143 La. An., 951.

If, therefore, the remedy given by the State Workmen's Compensation Act, Act 20 of 1914, is not the common law remedy saved to suitors in the Judi-

ciary Act, and if this act, being held repeatedly constitutional by the Supreme Court of Louisiana, is the *exclusive* remedy known to our law for redress for injuries received in hazardous occupations, thereby, in such case, repealing the statutory remedy of our Civil Law, Art. 2315 of the Civil Code, manifestly the plaintiff is without remedy in the State and is relegated to his action in admiralty, which is left unimpaired.

Under these circumstances the ruling of the highest Court of Louisiana, the Court of Appeals for the Parish of Orleans, having jurisdiction of this cause, concurred in by the Supreme Court, is correct and should be affirmed to the effect that an employee who suffers injury upon a vessel under a maritime contract cannot seek compensation in a State Court, and its finding that it is without jurisdiction *ratione materiae* is correct, conclusive and binding.

In *Lawson v. New York & P. R. S. S. Co., 148 La. An., p. 294*, the Supreme Court dismissed plaintiff's suit after the decision in the *Knickerbocker Ice Co. v. Stewart Case, 253 U. S., 149*, saying:

> "As this suit is brought upon a maritime contract, over which the District Courts of the United States have exclusive original jurisdiction, the suit will have to be dismissed."

The case of *Gray v. New Orleans Dry Dock & Shipbuilding Co., 146 La. An., 834*, relied on by plaintiff and appellant was, in effect, overruled by the case of *Lawson v. New York & P. R. S. S. Co., 148 La. An., p. 294*, just cited, and by the decision in this case by

refusing the writ of review applied for by plaintiff to the Supreme Court of the State from the decree of the Circuit Court of Appeals, in following words: "Writ refused, judgment correct."

Just as the Legislature of the State of Louisiana had the right to enact Article of the Civil Code 2315 compensating one for injuries received by the fault of another, so it had the right in hazardous occupations to declare, as it did, by Act 20 of 1914, that thereafter the remedies and compensations accorded by this Act 20 of 1914 should be *exclusive*, and thus to repeal Article of the Civil Code 2315, in all cases of hazardous occupations where injury was received. Therefore, in the absence of a common law remedy under the Louisiana Civil Law, and upon repeal of the statute which alone recognized rights which otherwise and under another system of law would be known as common law rights, there was nothing left to employees who are injured in hazardous occupations but the Workmen's Compensation Law, Act 20 of 1914. And, as this Court has held that such Compensation Laws are not the common law remedy contemplated in the original judiciary act, the plaintiff and appellant in this case is relegated to his admiralty action in the District Court of the United States.

We respectfully ask that this writ of error be dismissed, or that the judgment of the Louisiana Supreme Court be affirmed, dismissing plaintiff's suit.

Respectfully submitted,

PURNELL M. MILNER,
Attorney for Defendant and Appellee.